

APPEAL NO. 040952
FILED JUNE 7, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 30, 2004. The hearing officer determined that the appellant (claimant) is entitled to supplemental income benefits (SIBs) for the fourth quarter and that the respondent (carrier) waived the right to contest the claimant's entitlement to SIBs by failing to timely request a benefit review conference (BRC). The carrier appeals these determinations. The claimant urges affirmance of the hearing officer's decision.

DECISION

Reversed and rendered in part; reversed and remanded in part.

WAIVER OF RIGHT TO CONTEST SIBs ENTITLEMENT

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.108(d) (Rule 130.108(d)) requires a carrier to request a benefit review conference (BRC) within 10 days after the date it receives the Application for [SIBs] (TWCC-52) if it had paid SIBs for the previous quarter. A carrier's failure to do so results in the waiver of its right to contest the claimant's entitlement to SIBs for that quarter. Rule 102.3(d) provides that "[a]ny written or telephonic communications received other than during normal business hours on working days are considered received at the beginning of normal business hours on the next working day." Further, Rule 102.3(c) establishes that "[n]ormal business hours in the Texas workers' compensation system are 8:00 a.m. to 5:00 p.m. Central Standard Time with the exception of the Commission's field office whose normal business hours are 8:00 a.m. to 5:00 p.m. Mountain Standard Time." The preamble to Rule 102.3 comments that subsection (d) establishes the date communications are deemed received outside of normal business hours on working days. The preamble goes on to state:

New subsection (d) provides that written or telephonic communications received outside of normal business hours on a working day are considered received at the beginning of normal hours on the next working day. This subsection applies to communications received by any participant in the Texas workers' compensation system. A large number of Commission rules and sections of the Act lay out deadlines that begin with the receipt of a communication. Under the current rules, communications received at 11:59 p.m. on a Saturday night can trigger the start of a period to respond even though this is not a generally accepted work period for most of the participants in the system. By deeming communications received outside of normal business hours on a working day to be received at the beginning of the next working day, the

rule now reflects the general customs of the vast majority of system participants.

In a response to a comment about Rule 102.3(d), the Commission stated that Rule 102.3(d) “applies to communications among all participants in the Texas workers’ compensation system.”

The evidence reflects that the carrier received the claimant’s SIBs application via facsimile transmission (fax) on Friday, December 5, 2003, and that the transmission started at 5:09 p.m. The carrier’s request for a BRC was received by the Texas Worker’s Compensation Commission (Commission) on December 17, 2003. The hearing officer found that the carrier waived the right to contest the claimant’s SIBs entitlement by not requesting a BRC within 10 days after receiving the claimant’s application. Clearly, the hearing officer based this determination on the fact that the carrier received the application on Friday, December 5, rather than Monday, December 8, 2003. However, as noted above, since the fax was received after “normal business hours,” it was deemed received by the carrier on December 8, 2003. See Texas Workers’ Compensation Commission Appeal No. 030105, decided February 21, 2003. Because the carrier requested a BRC within 10 days of December 8, 2003, the hearing officer’s decision that the carrier waived its right to contest the claimant’s entitlement to fourth quarter SIBs is reversed and a new decision rendered that the carrier timely requested a BRC and, therefore, did not waive the right to contest the claimant’s entitlement.

SIBs ENTITLEMENT

Section 408.142 provides that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; and (2) has in good faith sought employment commensurate with her ability to work. A claimant can satisfy the good faith requirement by demonstrating that she had no ability to work for part of the qualifying period and by conducting a good faith job search in the other part of the qualifying period, but in order to prevail, the claimant must produce evidence that establishes the requirements of Rule 130.102(d)(4) for the period of time that no ability to work was asserted and evidence that meets the criteria of Rule 130.102(e) for the period of time wherein a good faith job search was claimed. Texas Workers' Compensation Commission Appeal No. 002428, decided December 1, 2000. The claimant asserted a hybrid theory of recovery at the hearing.

Rule 130.102(d)(5) provides that the good faith requirement may be satisfied if the claimant “has provided sufficient documentation as described in subsection (e).” Rule 130.102(e) states that “an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.” The rule then lists information to be considered in determining whether the injured employee has made a good faith effort, including, among other things, the

number of jobs applied for, applications which document the job search, the amount of time spent in attempting to find employment, and any job search plan. The parties stipulated that the qualifying period corresponding to the fourth quarter began on August 30, 2003, and ended on November 28, 2003. The evidence reflects that the claimant began documenting job searches on October 11, 2003, but documented no searches during the first six weeks of the qualifying period.

The hearing officer addressed the claimant's job search theory in the Statement of the Evidence and ultimately determined that she satisfied the good faith requirement for SIBs entitlement. However, as the claimant did not document a job search during each week of the qualifying period, she could not satisfy the good faith criterion for the entire qualifying period based on her job searches in the latter seven weeks of the qualifying period. Because the hearing officer failed to address or make findings as to whether the claimant satisfied the good faith criterion for the first six weeks of the qualifying period under the alternative no-ability-to-work theory, thereby entitling her to SIBs for the fourth quarter, we must remand for the hearing officer to make such findings based upon the evidence in the record. In doing so, the hearing officer should detail whether from August 30 through October 10, 2003, the claimant satisfied the requirements of Rule 130.102(d)(4), which states that the "good faith" criterion will be met if the employee:

has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Chris Cowan
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Edward Vilano
Appeals Judge